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No. 929

In the Supreme Court of the United States

OCTOBER TERM, 1958

HUGH BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

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In 1955, petitioner was convicted of having falsely sworn, in an affidavit filed with the National Labor Relations Board, that he was not affiliated with the Communist Party. He was thereupon sentenced to five years' imprisonment and a fine of $10,000. After full appellate proceedings, the judgment of the District Court was affirmed. 238 F. 2d 657, rehearing denied, 240 F. 2d 837, certiorari denied, 355 U. S. 817. Throughout these appellate proceedings, no challenge was made to the legality of the sentence (which, concededly, does not exceed the statutory limits).

After completion of these appellate proceedings, petitioner moved in the District Court, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for an order reducing or modifying the sentence. The instant appeal was taken from a denial of this motion.

We believe that the Court of Appeals was plainly correct in concluding (Pet. App. v-xii) that the appeal (which was ordered dismissed) was without substance, and we believe it apparent that this case presents no issue warranting review by this Court.

The principal contention advanced—a contention first made in the Court of Appeals following the denial of the motion to reduce sentence—is that the original five-year sentence falls under the constitutional ban of "cruel and unusual punishment." The short answer is that the sentence is within the statutory limits and that obviously the congressional authorization of a five-year term of imprisonment for false swearing involves no departure from traditional penalties. Undoubtedly the trial judge might have chosen to impose a lesser penalty. That, however, is not a matter for the appellate courts which, for generations, have "unswervingly denied themselves power to revise sentences on appeal," *United States* v. *Rosenberg*, 195 F. 2d 583, 604, note 25 (C. A. 2), certiorari denied, 344 U. S. 838. And see *Gurera* v. *United States*, 40 F. 2d 338, 340-341 (C. A. 8).

Petitioner also argues that the District Judge was arbitrary and capricious because he expressed himself, in the latest proceedings, as unable to believe that petitioner was dedicated to the Constitution and

laws of the United States. In this connection, it is contended that an "uncontroverted" affidavit filed by petitioner showed that there had been a complete change in his outlook (Pet. 26). We note in passing that the "uncontroverted" affidavit alleges that petitioner has had no Communist affiliations since 1947, whereas the jury necessarily found in the main case that petitioner was affiliated with the Party in 1951. There is a more basic answer—that it is the function of the District Judge (a judge who, in this instance, had presided at the trial) to evaluate the character and attitudes of the defendant for purposes of determining what sentence he should impose. His judgment in this area is not reviewable if the sentence imposed is within the permissible statutory limits.

Petitioner also urges that it was error to fail to include in the record on appeal a probation officer's supplemental report and attached data. That information, however, was for the use of the District Judge. Its function was to aid him in reaching a decision as to whether he should exercise his discretion in favor of reducing the lawful sentence previously imposed. Since that determination was one for his discretion alone, and since the appellate courts do not sit to revise the determinations of district judges in such matters, there was no occasion, we submit, to include the material in question in the appellate record.*

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* There is no claim that the probation officer's report (which petitioner has printed, Pet. App. xiii-xvii) contains any improper or prejudicial matter. On the contrary, the argument is that the report was favorable to petitioner and was not accorded sufficient weight. Pet. 29.

CONCLUSION

The appeal in this case raised no substantial issue within the province of the appellate courts, and it was properly ordered dismissed by the court below. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JUNE 1959.

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